Supreme Court, U.S.
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No. 96-590

In the Supreme Court of the United States

OCTOBER TERM, 1996

TIMOTHY SCOTT SHERMAN,

Petitioner

v.

WILLIAM L. SMITH, Warden, Maryland House of Correction–Annex, and JOHN JOSEPH CURRAN, JR., Attorney General for the State of Maryland,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The State's brief in opposition does not dispute that the important legal issues raised by Sherman's petition have been the subject of recurring conflict and confusion among the lower courts. Indeed, the State apparently concedes the existence of these conflicts (Br. in Opp. 22-24) but then attempts to avoid the force of those concessions by arguing, in summary form, that prior decisions of this Court "compel" (Br. in Opp. 23) the Fourth Circuit's conclusions, and that the positions advocated by Sherman — which have been accepted by other courts and were embraced by several members of the en banc court below — reflect only a "minority view" (*ibid.*). The State also raises, for the first time, two procedural obstacles that it contends may bar some of Sherman's claims. None of those arguments offers a tenable basis for denying Sherman's petition.

Unwilling to wrestle with the difficult and recurring issues raised by Sherman, the State resorts to an attempt to portray — through carefully worded sentences, selective record citations, and a description of the evidence in a light most favorable to the State — a case in which the evidence of petitioner's guilt appears substantial. Yet the State's slanted version of the facts is irrelevant if petitioner is correct in either his contention that the error in this case was structural and required automatic reversal, or his contention that the *Chapman* standard should have been applied below, which it was not. And, even if petitioner were wrong on both of those issues, the State's brief in opposition, with its sufficiency-oriented approach, would only show how critical it is that this Court grant review and *correct* the common yet erroneous view of the State and the majority below that harmless-error cases can be resolved by emphasizing the State's strongest evidence and ignoring the defendant's strongest evidence.

In its more candid moments, the State acknowledges that the record is far from satisfactory on the critical questions of Sherman's ability to have committed the murders in the manner alleged, the details of the extrinsic evidence gathered

by the wayward juror, and the prejudicial effect of the juror's actions on the verdict. Yet the State (like the majority below) fails to come to terms with the essence of the Court's harmless-error jurisprudence: a correct harmless-error inquiry does *not* ask whether the properly admitted incriminating evidence is such that an *untainted* jury *could reasonably* have reached a guilty verdict. Rather, it asks whether, in light of the error's relationship to the central issues and other evidence in the case, a court can conclude with confidence that the error *did not* affect the verdict. Pet. 26-28.

1. *Juror Evidence-Gathering Is Structural Error:*

a. Nowhere in its opposition does the State even question Sherman's demonstration that, had he been convicted in Georgia, New York, Pennsylvania, or any State within the territory of the United States Court of Appeals for the Ninth Circuit, he automatically would have received a new trial on constitutional grounds due to juror Miller's inspection of critical physical aspects of the crime scene bearing on his claims of innocence. Instead, the State asks the Court (Br. in Opp. 22-23) to ignore the conflict by summarily rejecting the considered constitutional holdings of those courts as "a minority view" plainly inconsistent with precedent.[1]

The State's argument misconstrues the Court's role in granting certiorari. The Court grants certiorari to determine which of two or more competing rules adopted in the lower courts better comports with the requirements of the Constitution as interpreted by this Court. Where, as here, the existence of a conflict is undeniable, a claim that the rule adopted by the highest courts of three States and a federal court of appeals is inconsistent with this Court's precedents is no basis at all for denying certiorari.

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[1] The State's conclusory assertion (Br.in Opp 23) that the Fourth Circuit's decision was compelled by decisions of this Court lacks merit. See Pet. 16-22.

b. The State seeks to avoid review of the structural-error issue by claiming that a decision by this Court in Sherman's favor on that issue (and *only* that issue) would be "precluded by the principle of nonretroactivity applicable in federal habeas corpus cases." Br. in Opp. 23. As the State admits (*ibid.*), it did not raise this issue below.

That failure weighs against consideration in this Court. The legal principles of *Teague* v. *Lane*, 489 U.S. 288 (1989), and its progeny are not "jurisdictional" (*Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990)), and this Court has repeatedly proceeded to reach the merits of habeas claims despite last-minute assertions of the *Teague* bar by State officials. See *Collins*, 497 U.S. at 41; *Schiro* v. *Farley*, 510 U.S. 222, 227-231 (1994); *Godinez* v. *Moran*, 509 U.S. 389, 397 n.8 (1993).[2] This case should be no exception to the general rule that claims not raised below are not considered by this Court. See, *e.g.*, *City of Springfield* v. *Kibbe*, 480 U.S. 257, 258-259 (1987).[3]

2. *If the Error in this Case Is Trial Error, the Standard of* Chapman *v.* California *Must Be Applied Because the State Courts Never Applied that Standard:* Once again, the State

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[2] The State also implies (Br. in Opp. 22-23) that its failure to assert this claim previously should be excused because Sherman allegedly "did not present a claim of per se error in the Maryland Court of Special Appeals." Whatever imprecision may have appeared in Sherman's statement of his position in that long-ago direct appeal, however, Sherman unambiguously raised a claim of per se reversal in his first petition to this Court in 1990 (while still on direct review), and has consistently done so ever since. The State, however, has not argued in *any* of the subsequent federal habeas proceedings that *Teague* barred consideration of this issue.

[3] The courts of appeals also have refused to consider *Teague* claims not raised in the district courts. See 2 LIEBMAN & HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.3, at 733-735 & n.3 (1994 & Supp. 1995) (citing cases).

does not deny that the lower courts are in conflict over whether the *Chapman* standard, or the *Brecht-Kotteakos* test, applies to those collateral cases in which the state courts failed to apply *Chapman* on direct review. Instead, the State simply argues that the Fourth Circuit's holding on this issue is correct (which it is not) and then spends many pages attempting to persuade the Court to accept a proposition that has never been accepted by any of the courts that have reviewed Sherman's claims — namely, that the state courts did in fact apply a *Chapman*-like review requiring the State to prove the absence of prejudice from the juror's actions.[4]

The State's contention is not simply erroneous; it is remarkable considering that the State has repeatedly argued that the juror's site visit did not implicate Sherman's constitutional rights and that *Sherman* bore the burden of proving prejudice in order to receive a new trial. See Pet. App. 38a. In light of the State's prior position on this matter, its statement (Br. in Opp. 16-17 n.11) that the Maryland appeals court rejected Sherman's claim "only after it was persuaded that the State had established that probable prejudice to Sherman had not occurred beyond a reasonable doubt" is inexplicable.

Neither the oral ruling of the trial judge (Br. in Opp. App. 2a) nor the written opinion of the Maryland Court of Special Appeals (Pet. App. 86a) acknowledges the constitutional nature of petitioner's claims or makes any reference to putting the burden of persuasion on the State. The appellate court's opinion, which the State admits was "terse" (Br. in Opp. 15 n.11), contains a single paragraph discussing prejudice. The court in that paragraph cited only one civil case

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[4] The State's assertion that Sherman's contrary view is "*not* reasonable" (Br. in Opp. 16 n.11) is baffling. Every one of the 17 federal judges who have considered the issue either expressed agreement with Sherman's view of the state courts' rulings (Pet. App. 26a n.14, 45a n.8, 63a) or assumed it to be correct without deciding the issue (Pet. App. 10a, 36a n.23, 54a-58a, 65a-67a).

for the applicable standard (*Wernsing* v. *General Motors Corp.*, 298 Md. 406, 470 A.2d 802 (1984)), a case in which the Maryland Court of Appeals explicitly "reject[ed] the rule which presumes prejudice" (298 Md. at 416) from juror exposure to extrinsic evidence. The case on which the State relies to support its contention (Br. in Opp. 15-16 n.11) — *Eades* v. *State*, 75 Md. App. 411, 541 A.2d 1001, cert. denied, 313 Md. 611, 547 A.2d 188 (1988) — is not cited in the "prejudice" paragraph at all, but rather in the following paragraph, and is cited solely for the proposition that "the grant or denial of a motion for new trial rests within the sound discretion of the trial judge." Pet. App. 86a.

The state courts plainly did not apply the *Chapman* standard, and accordingly the Eighth Circuit would have applied that standard on habeas review (see Pet. 25 & n.25), whereas the Fourth Circuit here applied a lower standard. The circuit conflict is squarely presented by this case and merits review.

3. *The Recent Federal Habeas Act Amendments, Even if Applicable, Do Not Dictate a Ruling in the State's Favor:* The State raises the question whether the recent amendments to 28 U.S.C. § 2254 — which state that federal courts should grant habeas relief only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" — are applicable to cases pending on the effective date of the amendments. Br. in Opp. 21 n.12. The State notes a conflict between the Seventh and Second Circuits on this issue, and then argues that this Court's resolution of that conflict in favor of applicability would "provide an additional basis for affirming the lower courts' denial of habeas relief" (Br. in Opp. 21-22 n.12).[5]

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[5] The State seems to suggest that, should Sherman's petition be granted, the State would raise this issue in its defense. Although we contend that the State may not do so at this stage, the possibility that the Court could use this case as a vehicle to resolve yet another conflict in the circuits would only add to its certworthiness.

Even if the amendments were applicable to pending petitions, however, they would not affect the Court's resolution of this case. As detailed at pages 4-5 above, the decisions of the state courts in this case utterly failed to comply with established precedent of this Court.

4. *The Prosecution's Lengthy "Restatement" of the Case Only Proves Its Certworthiness:* The State's labored effort (Br. in Opp. 2-20) to make this case appear factually unsympathetic to the petitioner is achieved (if at all) only at the price of revealing its own legal error — and that of the majority opinion below. For example, the State describes the evidence implicating Sherman in great detail, including some suggestions as to motive (Br. in Opp. 7, 12-13) that were *never* admitted at trial,[6] while mostly relegating to footnotes (or omitting entirely) the evidence that raises serious doubts about whether petitioner is guilty of these murders.

Faced with the weakness of its record — no direct evidence linking Sherman to the murders, no admissible evidence suggesting motive, and only highly ambiguous circumstantial evidence implicating Sherman — the State resorts to mischaracterization, insinuating that Sherman's actions during the police investigation reflected a concern typical of someone who was guilty of a crime. See Br. in Opp. 3-4 ("[w]hile his hands were being tested for gunshot primer residue * * *, Timothy Sherman explained that he had been hunting on" the

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[6] The State selectively quotes from the sentencing-hearing testimony of one witness to leave the false impression that Timothy's mother feared that her son would act violently against her. In fact, that witness testified that Timothy was a warm, sensitive, and loving son, and that at no time during her 14-month involvement with the family did anyone indicate any assaultive behavior on Timothy's part. SH Tr. 127, 131-132. This testimony, in any event, was *not* before the jury, but came later. The State's resort to quoting evidence that the jury did not hear shows how insupportable it is to contend that the *jury that heard the case* necessarily would have reached a guilty verdict in an error-free trial.

day before the murders). The record shows, however, that Sherman disclosed his recent prior use of a shotgun (for hunting) to the police *before* he was asked to take the residue test. C.A. App. 122. The State also intimates that the fact that Sherman "changed his story" (Br. in Opp. 3) about which gun he had used before the murders is somehow relevant to his guilt, but it is not: neither the 870 shotgun nor the 1100 Remington was the murder weapon (7 Tr. 90; 10 Tr. 47-48) — as Sherman would have known had he been the killer.

The State mischaracterizes the record in other ways.[7] It suggests (Br. in Opp. 6) that the Sherman fingerprints found on the alleged murder weapon would have been destroyed by a subsequent user of the weapon. But, as the State admits, Sherman's prints were discovered *above* the trigger assembly (and would not necessarily have been disturbed by subsequent use). No prints of value were discovered anywhere else on the gun, including the trigger itself, raising the possibility that other latent fingerprints had indeed been disturbed. C.A. App. 173-177; 8 Tr. 13. The State also implies that Sherman purchased the box of shotgun shells found by the police under his mattress (Br. in Opp. 6), but, again, there is no evidence of that.[8] And the State's continued reliance (Br. in Opp. 2)

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[7] The State seems to insinuate that William Gibson, Sherman's maternal grandfather, called attorney Stuart Robinson before calling 911 because of Sherman's need for legal representation. Br. in Opp. 3. But Mr. Robinson is married to Mr. Gibson's sole remaining daughter, Gail. If inferences are to be drawn from Mr. Gibson's actions, it is his nine years of steadfast support for the person who allegedly murdered his daughter (see Br. in Opp. 8 n.5) — not his spur-of-the-moment decisions about whether to inform family members or the police first about a horrible tragedy — that should be given weight.

[8] Sherman told the police that the day before the murders he had purchased *a* box of shells for hunting, but the State never proved that that box was the one found under his mattress. C.A. App. 93.

on the mere presence of an alarm as evidence of Sherman's guilt is unpersuasive in light of the evidentiary confusion (see Pet. 11 n.15) and intrigue surrounding that alarm system.[9]

It is when the State attempts to rebut Sherman's evidentiary arguments that it most exposes the weakness of its case and the mistaken nature of its legal arguments before this Court. For example, the State admits the lack of any gunshot primer residue on Sherman's hands, body, or clothing, but then tries to convince the Court that this prominent flaw is of no moment. Br. in Opp. 4 n.3. But the jurors — whose assessments are the relevant ones for harmless-error analysis — were troubled enough by the lack of residue on Sherman to request more details on this issue from the trial judge (C.A. App. 158), *despite* the evidence cited by the State.

Similarly, Sherman consistently has argued that the testimony of Corporal Hopkins — the tall, well-built officer who testified to retrieving the gun from the tree — strongly indicates that someone of Sherman's slight size could not have lodged the gun in the tree in the manner in which it was found without displaying some sign of his efforts. For its part, the State, whose views on this testimony over the years have not been marked by the same consistency, now offers two explanations that are "*equally, if not more, plausible*" (Br. in Opp. 6 (emphasis added)). Yet this striking concession that a reasonable jury could have accepted Sherman's interpretation of this crucial testimony proves Sherman's essential point: he is entitled to receive a verdict untainted by extrinsic evidence bearing on that testimony.

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[9] The State admits that other persons — notably Donald Sherman — had "ready access" to the Sherman home at all times and that Donald Sherman was "well-acquainted" with the alarm he had installed. Br. in Opp. 5 n.4. Donald Sherman went to the crime scene on the night after the murders, without notifying the police, purportedly to "check the alarm" (C.A. App. 47b); his son-in-law (a state trooper) testified that, after Donald Sherman adjusted something in the alarm closet, the alarm went off. 9 Tr. 46-49, 51-53.

The very real possibility that the juror's visit to the tree could have clarified this ambiguous testimony simply cannot be ignored.[10] The State tries, through careful phrasing (Br. in Opp. 9-10 & nn.6-9), to leave the impression that the record *affirmatively* disproves prejudice arising from the juror's actions, but that is certainly not so. Sherman never has claimed to know the details of the juror's investigation, but it is the very lack of such information in the record that prevents the State from satisfying *its* burden to prove the *absence* of prejudice arising from the site visit, as required under this Court's precedents. Pet. App. 38a-41a.[11] But the State fails even to acknowledge, let alone undertake, that burden.[12]

The State is asking this Court to permit the substitution of the State's own sufficiency-based verdict on Sherman for that of an impartial, untainted jury — which is precisely what the en banc majority did below. That mode of analysis places

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[10] The jury requested clarification of Hopkins' testimony as to whether it was in fact he who had retrieved the gun (C.A. App. 216), again indicating a level of discomfort with the State's proof.

[11] The State maintains that Miller's testimony is "*consistent with* the notion that his trip was prompted by idle curiosity" (Br. in Opp. 10-11 n.9 (emphasis added)) and (see Pet. 7-8 & nn.10-11) asserts that Sherman relies solely on an alternate juror's affidavit to contradict that hypothesis. The State ignores the instructions to the jury to consider only evidence emanating from the witness stand. 2 Tr. 91; 4 Tr. 90; 6 Tr. 148. And the State engages in a meaningless debate: unless it can affirmatively establish that Miller could not have learned additional information affecting his vote, it cannot prevail under a properly conducted harmless-error test.

[12] The State's attempt to cast aspersions on Sherman's counsel and on juror Miller's sworn testimony (Br. in Opp. 9) suggests desperation. As the State well knows, the defense first learned about juror Miller's site visit on the morning of sentencing, not two and a half months earlier as the State implies. C.A. App. 225-226.

the court below in conflict with other circuits[13] and with this Court's precedents (see Pet. 26-30). The Court should grant certiorari to resolve the conflict and correct the error.

5. *The Erroneous Application of the Harmless-Error Test by the Court Below Warrants the Court's Review:* The State's final argument, that the Court need not engage in an analysis "already conducted by two lower federal courts with the same result" (Br. in Opp. 25), ignores the fact that two different panels of the Fourth Circuit (see Pet. App. 42a-46a, 59a-64a) expressed views about Sherman's case contrary to those of the en banc majority, as did the four dissenters below (only one of whom was on the prior panels). Sherman's case hardly represents a run-of-the-mill habeas case in which the petitioner's factual guilt is clear and he relies on legal technicalities to overturn a valid conviction. To the contrary, this is a doubtful case in which the petitioner's trial was tainted by a constitutional error posing a substantial risk of prejudice. The admitted fact (Br. in Opp. 8 n.5) that Sherman has had the full support of the family of one of his supposed victims confirms that the State simply has not demonstrated "powerful" (Br. in Opp. 20) evidence of guilt, such that any court could properly conclude, with confidence, that Sherman would have been convicted in an error-free trial.[14]

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[13] See, *e.g.*, *United States* v. *Smart*, 98 F.3d 1379, 1392 (D.C. Cir. 1996) (rejecting a sufficiency-based harmless-error analysis and stating that, "in a case where the evidence at trial is conflicting or ambiguous, the danger that an error will affect the jury's verdict is almost always substantial").

[14] The State asserts that a grant of certiorari would serve no purpose other than to apply settled law to a particular set of facts (Br. in Opp. 21, 25), but this Court has not shied away from itself applying harmless-error analysis to particular facts, especially where, as here, the lower court fundamentally misconstrues that analysis. See, *e.g.*, *Yates* v. *Evatt*, 500 U.S. 391, 407-411 (1991); *Satterwhite* v. *Texas*, 486 U.S. 249, 258-260 (1988).

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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